

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**ASAP RELOCATION, INC., DBA  
AMERICA BEST MOVERS,**

**Respondent.**

**Docket No. FMCSA-2009-0224<sup>1</sup>  
(Western Service Center)**

**ORDER DENYING PETITION FOR RECONSIDERATION**

***1. Background***

On July 2, 2009, the California Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on ASAP Relocation, Inc., dba America Best Movers (Respondent).<sup>2</sup> The NOC, based on a June 10, 2009 compliance review, charged Respondent with three violations of 49 CFR 395.3(a)(2), requiring or permitting a property-carrying commercial motor vehicle driver to drive after the end of the 14<sup>th</sup> hour after coming on duty, and proposed a civil penalty of \$2,190 (\$730 per count).

After Respondent failed to respond to the NOC, the Field Administrator for the FMCSA's Western Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on August 10, 2009.<sup>3</sup> The NDFAO advised Respondent that

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<sup>1</sup> The prior case number was CA-2009-0649-US1275.

<sup>2</sup> See Exhibit 1 to Field Administrator's Answer and Opposition to Petition for Reconsideration Pursuant to 49 CFR 386.64 and Memorandum of Law in Support (Claimant's Answer to Petition).

<sup>3</sup> See Exhibit 3 to Claimant's Answer to Petition.

the NOC would become the Final Agency Order in this proceeding effective August 17, 2009, with the civil penalty immediately due and payable on that date.

On August 19, 2009, Respondent served a Petition for Reconsideration and request for hearing.<sup>4</sup> Respondent argued that the Final Order should be vacated because there was excusable neglect in failing to timely respond to the NOC, Respondent had a meritorious defense to the alleged violations, and Respondent acted with due diligence in seeking relief.

Respondent submitted the Declaration of its President, Roni Hayon, who stated that he was traveling out of the country on a personal matter between July 27 and August 10, 2009 and was unavailable to review and respond to the NOC until after his return. Respondent claimed it had a meritorious defense to the charges because it did not violate § 395.3(a)(2) and offered to provide evidence of this defense at a hearing. Finally, Respondent argued that it acted with due diligence by seeking legal counsel following Mr. Hayon's return to the United States.

In his Answer to the Petition served September 23, 2009, Claimant requested that the petition be denied because Respondent defaulted by failing to timely reply to the NOC and did not set forth any basis for reconsideration of the Final Agency Order.

## ***2. Decision***

Because Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a), he defaulted.<sup>5</sup> Under 49 CFR 386.64(b), a

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<sup>4</sup> See Exhibit 5 to Claimant's Answer to Petition.

<sup>5</sup> The NOC reply deadline was August 6, 2009. This date was calculated by adding 30 days to the July 2, 2009 service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent failed to meet his burden of demonstrating that the Final Agency Order should be vacated. Claimant established that Federal Express delivered the NOC to Respondent on July 6, 2009, three weeks before Mr. Hayon claimed to have left the country.<sup>6</sup> Consequently, Mr. Hayon had ample time to personally attend to this matter before leaving the country, delegate it to someone else for handling or, in the alternative, request an extension of the filing deadline. In paragraph 6 of his Declaration, Mr. Hayon stated: "In good faith I relied upon my legal counsel to advise and resolve the matter on my behalf." Mr. Hayon's failure to identify which attorney he relied upon to handle this matter before his departure undermines the credibility of this statement. Even if he had identified the attorney, the failure of a carrier's agent to carry out his responsibilities with respect to replying to the NOC on behalf of Respondent does not constitute excusable neglect.<sup>7</sup> I conclude there was no excusable neglect under these circumstances.

Although Respondent claimed to have a meritorious defense, it did not indicate what that defense might be, promising to do so only if a hearing is granted. Its assertion that Respondent's driver did not violate the regulations on the dates indicated in the NOC

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<sup>6</sup> See Exhibit 2 to Claimant's Answer to Petition. E. Mendoza signed the delivery receipt on behalf of Respondent.

<sup>7</sup> See *In the Matter of Short Hop Moving, Inc.*, Docket No. FMCSA-2008-0243, Order Denying Petition for Reconsideration, January 7, 2010, at 3.

is no more than a general denial of the charges and is insufficient to demonstrate a meritorious defense.<sup>8</sup>

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Even if, for the sake of argument, Respondent acted with due diligence in seeking the assistance of legal counsel shortly after Mr. Hayon returned to the United States, it would be an empty exercise or futile gesture to vacate the Final Agency Order because it did not demonstrate a meritorious defense.<sup>9</sup>

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$2,190 is due and payable immediately. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.

*It Is So Ordered.*



Rose A. McMurray  
Assistant Administrator  
Federal Motor Carrier Safety Administration

9.3.10  
Date

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<sup>8</sup> See *In the Matter of Wachstetter Farms, Inc.*, Docket No. FMCSA-2008-0016, Order Denying Petition for Reconsideration, June 27, 2008, at 5.

<sup>9</sup> See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

**CERTIFICATE OF SERVICE**

This is to certify that on this 1 day of September, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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